National Association of Broadcast Employees and Technicians, Local 531, AFL-CIO, CLC (Skateboard Productions, Inc.) *and* Ross Kelsay, Bruce McGregor and William Pecchi. Cases 31-CB-2639 and 31-CB-2831

December 16, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING, ZIMMERMAN, AND HUNTER

On September 28, 1979, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] holding that Respondent, herein also called the Union, violated Section 8(b)(1)(A) of the Act by, *inter alia*, assessing and attempting to enforce fines against employees Ross Kelsay and Bruce McGregor for returning to work during Respondent's boycott of the Employer, Skateboard Productions, Inc. In so holding, the Board concluded that Kelsay and McGregor had effectively resigned from the Union prior to their return to work and, therefore, the imposition of the fines against them for their protected postresignation conduct constituted unlawful restraint and coercion. In finding that Kelsay and McGregor had effectively resigned, the Board rejected Respondent's assertion that a clause in its constitution on resignations[2] prohibited Kelsay and McGregor from effectively resigning for 60 days, concluding that the resignation clause was vague and ambiguous and, therefore, unenforceable. Accordingly, the Board did not pass on the validity under the Act of a 60-day limitation on the effective date of resignations. Respondent was ordered to cease and desist from the conduct found unlawful and to take certain affirmative actions designed to effectuate the policies of the Act. Thereafter, Respondent filed a petition for review of said Order and the Board filed a cross-application for enforcement with the United States Court of Appeals for the Ninth Circuit.

On November 12, 1980, in a memorandum opinion, the court declined to enforce the Board's Order and remanded the case to the Board for further proceedings.[3] In the court's view, "The resignation clause is not ambiguous as applied to the employees [Kelsay and McGregor] who were fined . . . . Thus the Board was squarely presented with a dispute concerning the validity of the constitutional provision for a 60-day waiting period during which the Union may delay acting upon a request for resignation." The court remanded the case to the Board to address that issue.

Thereafter, the Board informed the parties that they were entitled to file statements of position on the issue remanded to the Board. Respondent filed a statement of position.

The Board, having accepted the remand, accepts the court's view that the resignation clause is not ambiguous for the purpose of deciding this case and discusses hereafter the validity of the Union's constitutional provision.

The facts were largely stipulated and are set forth fully in the Administrative Law Judge's Decision accompanying our earlier Decision and Order. The stipulation reveals that Respondent commenced a boycott against the Employer on or about February 7, 1977.[4] Kelsay and McGregor were informed of the boycott orally on that date and in writing on February 10. On February 14, both Kelsay and McGregor submitted written resignations to the Union and returned to work at Skateboard. On the basis of his credibility resolutions, the Administrative Law Judge determined that Kelsay and McGregor did not commence work on February 14 until after their letters of resignation had been delivered to the Union. They continued to work for the Employer until March 18.

On March 11, Respondent's representative, Favara, filed written charges with Respondent alleging that Kelsay and McGregor acted in violation of various union rules by performing work for the Employer on and after Feburary 14. A hearing on the charges was held before Respondent's local executive board on April 26. Kelsay and McGregor chose not to attend, although they had received written notice of the hearing. Following the hearing, fines were imposed against Kelsay and McGregor in the amount of $10,027 and $6,742, respectively. The amounts were based on the estimated earnings of the two during the period they worked after institution of the boycott. Neither Kelsay nor McGregor appealed the fines and Respondent has instituted civil court proceedings to collect the fines.

[1] 245 NLRB 638.

[2] Art. II, sec. 2.6, of Respondent's International constitution provides as follows:

> Resignation of Membership. Any member not in arrears in payment of dues or in the performance of any obligation or duty to the International Union or to any Local Union and against whom no charges are pending may at any time request resignation from the Union. A request to resign shall be in writing addressed to the Local Union. In the case where no action is taken by the Local Union, the resignations shall become automatically effective at the end of sixty (60) days.

[3] *National Association of Broadcast Employees and Technicians, Local 531, AFL-CIO, CLC* v. *N.L.R.B.*, No. 79-7548.

[4] Unless otherwise noted, all dates are in 1977.

As noted above, the issue presented is the validity under the Act of Respondent's constitutional provision for a 60-day waiting period during which the Union may delay acting on a request for resignation. If such a provision is valid, the fines would appear to be lawful inasmuch as Kelsay and McGregor would not have effectively resigned at the time they returned to work. If, however, the rule is invalid, and cannot act as a bar to the resignations of Kelsay and McGregor, their postresignation conduct would be protected by the Act and the fines would constitute a violation of Section 8(b)(1)(A). For the reasons set forth below, we find that Respondent's 60-day restriction on its members' Section 7 rights is unreasonable and unenforceable. Accordingly, we find that the imposition and attempt to enforce the fines against Kelsay and McGregor violated Section 8(b)(1)(A).

In *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor)*, 263 NLRB 984 (1982), the Board ruled that a union can, consistent with the Act, impose reasonable time restrictions on its members' right to resign and, thereby, effectively preclude a member from returning to work during a strike for a specified period.[5] In reaching that conclusion, the Board found it necessary to "balance two fundamental principles . . . that inherently conflict."[6] The first is an employee's right to resign from union membership, a right reflected in the Section 7 right of an employee to refrain from engaging in concerted activities.[7] In competition with that right is the union's interest in preserving strike solidarity in order to protect the members who decided to adhere to a decision to strike, as well as the union's need to achieve responsible operational effectiveness by imposing rules governing the acquisition and retention of membership pursuant to the proviso to Section 8(b)(1)(A). As we noted in *Dalmo Victor*, none of the foregoing competing principles is absoulte. Thus, members do not have an unfettered right to resign at any time. Nor, however, can a union totally preclude a member from resigning or bind that employee to adhere to a strike for an indefinite period. In short, we recognized the need in *Dalmo Victor* to advance a salutatory rule that accommodated, to the extent possible, the fundamental conflicting principles.

In the instant case, Respondent, by its constitution, has imposed what amounts to a 60-day waiting period before resignations become effective.[8] Initially, we note that Respondent's 60-day rule does not suffer from the same infirmities as did the rule in *Dalmo Victor*. Thus, Respondent's rule does not differentiate between strike and nonstrike situations and it is a restriction with a fixed duration. In addition, the parties stipulated that the purposes sought to be achieved by the rule are to assure that all dues and other charges owing the Union are paid prior to resignation and to assure solidarity for at least a 60-day period during a strike or boycott. As noted above, these represent legitimate union interests sufficient to justify some imposition on Section 7 rights of members. Thus, we find that Respondent's rule contains several elements that are not objectionable under the Act.

We further find, however, that Respondent's rule must fall because of its excessive duration. As we stated in *Dalmo Victor* at 987:

> Having carefully considered the competing interests involved, we find that a rule which restricts a union member's right to resign for a period not to exceed 30 days after the tender of such a resignation reflects a reasonable accommodation between the right of union members to resign from the union and return to work, and the union's responsibility to protect the interests of employees who maintain their membership, as well as its need to dispose of administrative matters arising from such resignations.

Here, Respondent's restriction extends to 60 days, twice the length of time we have determined is appropriate in view of the imposition of the Section 7 right of employees the restriction represents. We find that neither the objectives sought to be achieved by Respondent's rule nor any extraordinary circumstances justify a 60-day restriction. Accordingly, we find that Respondent's 60-day waiting period for a resignation to be effective is unreasonable.

In its statement of position, Respondent urges that, even if the 60-day waiting period is found to be excessive, the fines in the instant case should be upheld, at least to the extent that the fines cover actions that would fall within the time limit found

[5] Although the Board majority found that a union can place reasonable time restrictions on a member's right to resign, the rule in *Dalmo Victor* was found to be in valid inasmuch as the rule there "locked in" members for the duration of any given strike. Such an open-ended restriction was found to be unreasonable.

[6] *Dalmo Victor, supra*, 985.

[7] In Member Fanning's view, the focus should be placed on an employee's right to refrain from concerted activity by working during a strike rather than on any "right to resign," as such. See *Dalmo Victor*, at 986, fn. 13.

[8] Under Respondent's rule, the Union can authorize a resignation before the 60-day period expires.

reasonable by the Board for restricting resignations.[9] We disagree.

Respondent's argument is based on a misconception of the statutory right of employees to refrain from concerted activities. As we indicated in *Dalmo Victor*, the Act protects the right of employees to resign from a union and return to work, even during the first 30 days of the strike. However, in balancing the competing interests at stake, we concluded, in *Dalmo Victor*, that employee rights would be outweighed in situations where the union promulgated a rule placing a reasonable time limitation on the right to resign. No such circumstances is present in this case because Respondent's rule goes beyond what we have determined to be the permissible scope of restrictions on resignations. Accordingly, as in other instances where a rule impinging on fundamental Section 7 rights of employees is too broadly drawn,[10] we conclude that Respondent's rule is generally invalid and cannot be relied on to justify the fines against Kelsay and McGregor.[11]

In conclusion, we find for the reasons stated above that Respondent's constitutional provision imposing a 60-day waiting period before resignations become effective is unreasonable and cannot be enforced. Therefore, the resignations of Kelsay and McGregor were effective upon their submission, and Respondent's imposition and attempted collection of fines against them for engaging in protected postresignation conduct violated Section 8(b)(1)(A). The appropriate remedy for the foregoing violations is fully set forth in our September 28, 1979, Decision and Order (reported at 245 NLRB 638) in this proceeding and we shall order Respondent to take the action set forth therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board affirms its Order set forth in its Decision and Order at 245 NLRB 638 (1979), and hereby orders that the Respondent, National Association of Broadcast Employees and Technicians, Local 531, AFL-CIO, CLC, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in said Order.

CHAIRMAN VAN DE WATER and MEMBER HUNTER, concurring:

We concur in the holding of our colleagues that Respondent violated Section 8(b)(1)(A) by imposing and attempting to enforce fines against Kelsay and McGregor for returning to work during Respondent's boycott of the Employer, Skateboard Productions, Inc. We also agree that Respondent's 60-day waiting period before resignations become effective is unreasonable and cannot be enforced. We do so, however, for the reasons stated in our concurring opinion in *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor)*, 263 NLRB 984 (1982), in which we stated our view that any restriction imposed upon a union member's right to resign is unreasonable and, therefore, the imposition of any fines or other discipline premised upon such restrictions violates Section 8(b)(1)(A).

[9] Respondent's assertion that Kelsay and McGregor were "fined for the first day" is somewhat puzzling inasmuch as the stipulation states that they were fined $10,027 and $6,742, respectively, which amounts reflected the estimated earnings of the two for the 33-day period they worked during the boycott. Accordingly, we must construe Respondent's argument as a claim that the fines should be upheld to the extent they apply to alleged misconduct occurring prior to the 30-day expiration period.

[10] See, e.g., *The Times Publishing Company*, 240 NLRB 1158, 1160 (1979), where the Board assessed the application of an overly broad no-solicitation rule to a particular set of facts stating: "[O]nce a rule is found to be generally invalid, it is invalid for all purposes and cannot be applied as valid in part to a specific area."

[11] Contrary to Respondent's apparent assumption, it is not the Board's practice to rewrite an invalid rule and then apply it to the facts at hand. Rather, in cases where the Board has found the rule governing resignations to be unreasonable, the Board has concluded that the employees' resignations were effective upon receipt by the union. See, e.g., *Local 1384, United Automobile, Aerospace, Agricultural Implement Workers, UAW (Ex-Cell-O Corporation)*, 227 NLRB 1045 (1977).